INDIRECT ENCROACHMENT ON FEDERAL AUTHORITY BY THE TAXING POWERS OF THE STATES.[1] II

II. Regulations of Interstate Commerce

THE doctrine that a state cannot tax interstate commerce is derived from an interpretation of the clause in the Constitution granting to Congress the power to regulate such commerce. The steps in this interpretation are the declarations that taxation of commerce is a regulation thereof,[2] that the state cannot regulate those subjects of interstate commerce which are national in character,[3] and that exchange and transportation of commodities between the states are national in character.[4] State taxation which falls directly on exchange and transportation between the states has uniformly been held beyond the power of the state.[5] On the other hand, property within the state,[6] privileges granted by the state,[7] and intra-state commerce done within the state [8] are uniformly held proper subjects of state taxation. If the power to

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[1] For the general introduction to this discussion and for the first section dealing with "Interferences with Federal Instrumentalities," see 31 HARV. L. REV. 321–72 (January, 1918).

[2] The Passenger Cases, 7 How. 283 (1849).

[3] Cooley *v.* Board of Wardens of Philadelphia, 12 How. 299 (1851).

[4] Welton *v.* Missouri, 91 U. S. 275, 280 (1876).

[5] Case of the State Freight Tax, 15 Wall. (82 U. S.) 232 (1873); Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S. 196, 5 Sup. Ct. Rep. 826 (1885); Robbins *v.* Shelby County Taxing District, 120 U. S. 489, 7 Sup. Ct. Rep. 592 (1887); Philadelphia & Southern Mail S. S. Co. *v.* Pennsylvania, 122 U. S. 326, 7 Sup. Ct. Rep. 1118 (1887); Leloup *v.* Port of Mobile, 127 U. S. 640, 8 Sup. Ct. Rep. 1380 (1888); McCall *v.* California, 136 U. S. 104, 10 Sup. Ct. Rep. 881 (1890); Crutcher *v.* Kentucky, 141 U. S. 47, 11 Sup. Ct. Rep. 851 (1891).

[6] Brown *v.* Houston, 114 U. S. 622, 5 Sup. Ct. Rep. 1091 (1885).

[7] Cases cited in notes 21, 23, 33, 35, 38, *infra*.

[8] Home Machine Company *v.* Gage, 100 U. S. 676 (1880); Ratterman *v.* Western Union Telegraph Co., 127 U. S. 411, 8 Sup. Ct. Rep. 1127 (1888); Pacific Express Co. *v.* Seibert, 142 U. S. 339, 12 Sup. Ct. Rep. 250 (1892); Emert *v.* Missouri, 156 U. S. 296, 15 Sup. Ct. Rep. 367 (1895); Williams *v.* Fears, 179 U. S. 270, 21 Sup. Ct. Rep. 128 (1900); Kehrer *v.* Stewart, 197 U. S. 60, 25 Sup. Ct. Rep. 403 (1905).

tax necessarily involved the power to destroy,[9] if the question were entirely one of power and not at all one of economics,[10] it would follow that no tax on these subjects could be held invalid as a regulation of interstate commerce.

Though the maxims quoted would preclude inquiry into the effect on interstate commerce of a tax imposed on a subject within the authority of the state, the inquiry is logically permissible. We may grant that a tax on a subject of interstate commerce is a regulation of such commerce. We may concede that some taxes levied on other subject matters are not regulations of interstate commerce. But we may still inquire whether other taxes on subjects not themselves interstate commerce may not properly be regarded as regulations of interstate commerce. And the Supreme Court holds that taxes on subjects not themselves interstate commerce are nevertheless regulations of such commerce, where in effect they discriminate against interstate commerce in favor of intra-state commerce.

1. *Taxes Discriminating against Interstate Commerce*

In *Welton* v. *Missouri*[11] the court held invalid a state statute imposing a tax nominally on peddlers, but defining a peddler as one who peddles goods which are not the growth, produce, or manufacture of the state. Mr. Justice Field declared that any tax which was levied on the sale of goods for the reason that they originated in other states was invalid as a regulation of interstate commerce. In answer to the contention of the state that the goods in question were no longer in the original packages, he said that the commercial power of Congress over commodities which have been brought into a state from other states "continues until the commodity has ceased to be the subject of discriminating legislation by reason of its foreign character."[12] A similar doctrine was laid down in *Darnell* v. *Memphis*,[13] which held that a state could not,

[9] Chief Justice Marshall in McCulloch *v.* Maryland, 4 Wheat. 316, 431 (1819). See 31 HARV. L. REV. 321.

[10] Mr. Justice Moody in Home Savings Bank *v.* Des Moines, 205 U. S. 503, 518, 27 Sup. Ct. Rep. 571 (1907). See 31 HARV. L. REV. 343.

[11] 91 U. S. 275 (1876).

[12] 91 U. S. 275, 282 (1876).

[13] 208 U. S. 113, 28 Sup. Ct. Rep. 247 (1908). For other cases affirming the doctrine that a state cannot by taxation discriminate against interstate commerce, see

by exempting from its general property-tax, articles which were manufactured from the produce of the state, impose such a tax solely on goods manufactured from the produce of other states.

In these decisions the state tax was declared invalid as a regulation of interstate commerce, though the subjects of taxation were sales of goods within the state and personal property located within the state. In both cases the articles had lost their interstate character before they or their sales had become subject to the statute of the state. They were within the taxing power of the state in the same manner and to the same extent as articles of domestic origin were within the power of the state.[14] But the economic result of imposing heavier taxes on goods and the sales of goods of extra-state origin than on those of intra-state origin was to burden the future introduction of merchandise from other states, and thus to give an economic advantage to domestic producers. In deciding these cases, therefore, the Supreme Court applies an economic test to determine whether taxes, levied on subjects not in themselves interstate commerce, are nevertheless regulations of interstate commerce. In substance it declares a tax invalid solely because of objection to the measure by which the amount of the tax is determined. If the rate imposed had not been higher than that applied to goods of domestic origin, the tax would have been sustained. The taxes held unconstitutional would be made entirely valid by the imposition of similar taxes on goods of domestic origin.

2. *Taxes not Discriminating against Interstate Commerce*

If a state tax falls directly on a subject of interstate commerce, it is invalid notwithstanding the fact that the identical tax is

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Pierce *v.* The State, 13 N. H. 536, 582 (1843), *semble;* State *v.* North & Scott, 27 Mo. 464 (1858); Guy *v.* Baltimore, 100 U. S. 434 (1880); Tiernan *v.* Rinker, 102 U. S. 123 (1880); Walling *v.* Michigan, 116 U. S. 446, 6 Sup. Ct. Rep. 454 (1886); and *Ex parte* Stoddard, 35 Nev. 504, 131 Pac. 133 (1913). See also HALL, CASES ON CONSTITUTIONAL LAW, 1086, note 1. For cases sustaining seeming discriminations against interstate commerce, on the ground that the state had based its differences of treatment on a proper classification under the police power, see McGuire *v.* State, 42 Ohio St. 530 (1885); Reyman Brewing Co. *v.* Brister, 179 U. S. 445, 21 Sup. Ct. Rep. 201 (1900); Cox *v.* Texas, 202 U. S. 446, 26 Sup. Ct. Rep. 671 (1906); and State *v.* Parker Distilling Co., 236 Mo. 219, 139 S. W. 453 (1911).

[14] A non-discriminatory tax on goods of extra-state origin was sustained in Brown *v.* Houston, note 6, *supra.* A tax on all peddlers was sustained in Emert *v.* Missouri, note 8, *supra.*

imposed on corresponding intra-state commerce. "Interstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce, or that which is carried on solely within the state." [15] The question is treated as one of power and not of economics. The Supreme Court fixes its attention, not upon the economic results of the tax, but upon the legal *res* which is declared by the statute to be the subject on which the tax is imposed. This is not to say that economic considerations have been entirely neglected in determining what subjects of taxation are to be regarded as in themselves interstate commerce. But what the court considers in this connection is not the burden imposed by the particular tax before it, but the burden which would result if the subject were taxed to the point of extinction.

Where, however, the subject on which the tax is imposed is not itself interstate commerce, it is manifest that only by recourse to its economic effect on interstate commerce could it be declared a regulation of such commerce. But, with the exception of the cases involving discriminations against interstate commerce, the early decisions of the Supreme Court did not regard as important the measure by which the amount of a tax was determined, provided the subject on which the tax was levied was within the authority of the state. The subjects of taxation with which these cases have been concerned are acts, occupations, property, and privileges. The questions under consideration could of course arise only when the property was employed in interstate commerce, when the act or occupation was conducted in some connection with interstate commerce, or when the privilege was enjoyed by those engaged in whole or in part in interstate commerce.

A. TAXES ON PRIVILEGES [16]

It has never been urged that taxes on inheritances were regulations of interstate commerce, even when the property passing

[15] Mr. Justice Bradley in Robbins *v.* Shelby County, note 5, *supra.*

[16] "Privilege" is here used in the sense of some permission obtained from the state which might have been entirely withheld. The two such privileges involved in the decisions to be considered are the privilege of being a domestic corporation and the privilege of a foreign corporation to exercise its corporate powers within the state for the conduct of business which is not interstate commerce. "Privilege" is often used in a broader sense in speaking of "privilege taxes." See Mr. Justice Harlan in Western Union Telegraph Co. *v.* Kansas, 216 U. S. 1, 43, 30 Sup. Ct. Rep. 190 (1910):

by the inheritance derived its value from some connection with interstate commerce. The privilege taxes which have been challenged as regulations of interstate commerce have been those levied on the privileges of being a corporation, or of exercising corporate powers within the state. The state may decline to create a corporation. It may decline to permit a foreign corporation to enter the state to carry on intra-state commerce. From the power of the state to forbid has been inferred the power to burden as it pleases.

(*a*) *The Doctrine of Unlimited Power*

In *State Tax on Railway Gross Receipts*,[17] decided in 1872, the court sustained a Pennsylvania statute imposing on every railroad company incorporated under the laws of Pennsylvania a tax of three-fourths of one *per centum* upon the gross receipts of said company. One of the grounds on which the decision was based is thus stated in the opinion of the court:

"It is not to be questioned that the States may tax the franchises of companies created by them, and that the tax may be proportioned either to the value of a franchise granted, or to the extent of its exercise; nor is it deniable that gross receipts may be a measure of proximate value, or, if not, at least of the extent of enjoyment. If the tax be, in fact, laid upon the companies, adopting such a measure imposes no greater burden upon any freight or business from which the receipts come than would an equal tax laid upon a direct valuation of the franchise. In both cases, the necessity of higher charges to meet the exaction is the same." [18]

It is to be noted that Mr. Justice Strong cites no authority for this doctrine that the state may measure a tax on corporate fran-

"Any occupation, business, employment, or the like, affecting the public, may be classed and taxed as a privilege," citing Knoxville & O. R. Co. *v.* Harris, 99 Tenn. 684, 43 S. W. 115 (1897). Privilege taxes of this more general character will be dealt with in a succeeding section under the head of "taxes on acts and occupations."

[17] 15 Wall. (82 U. S.) 284 (1873).

[18] 15 Wall. 284, 296 (1873). The other reason given for the decision was that the tax was laid "upon a fund which has become the property of the company" and "which has lost its distinctive character of freight earned, by having become incorporated into the general mass of the company's property." This ground of the decision was subsequently discountenanced in Philadelphia & Southern Mail S. S. Co. *v.* Pennsylvania, note 5, *supra*.

chises granted by it in any way that it pleases. Mr. Justice Miller dissented. With him concurred Justices Field and Hunt. The dissenting opinion lays emphasis on the fact that the imposition of the tax is in reality on transportation, and that it must be paid out of the receipts thereof,[19] and must therefore increase the price of such transportation. No attention was paid specifically to the argument of the majority that the tax was justified, because of the power of the state to deny the privilege of incorporation. The reasoning, however, was sufficiently broad to cover the contention:

"I lay down the broad proposition that by no device or evasion, by no form of statutory words, can a State compel citizens of other States to pay to it a tax, contribution, or toll, for the privilege of having their goods transported through that State by the ordinary channels of commerce." [20]

In *Delaware Railroad Tax*,[21] decided the following year, the court, in unanimously sustaining a Delaware statute imposing a tax on a Delaware corporation, expressed the doctrine as follows:

"As we construe the language of the fourth section, the tax is neither imposed upon the shares of the individual stockholders nor upon the property of the corporation, but is a tax upon the corporation itself, measured by a percentage upon the cash value of a certain proportional part of the shares of its capital stock; a rule which, though an arbitrary one, is approximately just, at any rate is one which the legislature of Delaware was at liberty to adopt.

"The State may impose taxes upon the corporation as an entity existing under its laws, as well as upon the capital stock of the corporation or its separate corporate property. And the manner in which its value shall be assessed and the rate of taxation, however arbitrary or capricious, are mere matters of legislative discretion. It is not for us to suggest in any case that a more equitable mode of assessment or rate of taxation might be adopted than the one prescribed by the legislature of the State; our only concern is with the validity of the tax; all else lies beyond the domain of our jurisdiction." [22]

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[19] Mr. Justice Miller asks whether the tax is "within the evil intended to be remedied by the commerce clause of the Constitution" and answers: "It seems to me that to hold that the tax on freight is within it, and that on gross receipts arising from such transportation is not, is 'to keep the word of promise to the ear and break it to the hope.'" 15 Wall. 284, 298 (1873).

[20] 15 Wall. 284, 299 (1873).

[21] 18 Wall. (85 U. S.) 206 (1874).

[22] 18 Wall. 206, 231 (1874).

In *Railroad Co.* v. *Maryland*[23] the court sustained a stipulation in the charter of a corporation created by the state of Maryland that the corporation should pay to the state in January and July, in each and every year, one-fifth of the whole amount which may be received for the transportation of passengers on said railroad by said company during six months last preceding. Since the corporation was engaged in transportation between Baltimore and Washington, the receipts which were made the measure of the annual payment were in large part receipts from interstate commerce. In the opinion of Mr. Justice Bradley, it was stated that it would have been possible for the state to construct a railroad between Baltimore and Washington, and exact such compensation for transportation on such road as it chose.

"As before said, the State could have built the road itself and charged any rate it chose, and could thus have filled the coffers of its treasury without being questioned therefor. How does the case differ, in a constitutional point of view, when it authorizes its private citizens to build the road and reserves for its own use a portion of the earnings? We are unable to see any distinction between the two cases. In our judgment there is no solid distinction. If the State, as a consideration of the franchise, had stipulated that it should have all the passenger-money, and that the corporation should have only the freight for the transportation of merchandise, and the corporation had agreed to those terms, it would have been the same thing. It is simply the exercise by the State of absolute control over its own property and prerogatives." [24]

The fact that this exaction by the state would affect interstate transportation was said to be not material, and it was pointed out that the same result follows from every burden or tax imposed on corporations engaged in interstate commerce.

"The State is conceded to possess the power to tax its corporations; and yet every tax imposed on a carrier corporation affects more or less the charges it is compelled to make upon its customers. So, the State has an undoubted power to exact a bonus for the grant of a franchise, payable in advance or *in futuro;* and yet that bonus will necessarily affect the charge upon the public which the donee of the franchise will be obliged to impose. The stipulated payment in this case, indeed, is nothing more

[23] 21 Wall. (88 U. S.) 456 (1875).
[24] 21 Wall. 456, 472 (1875).

nor less than a bonus; and so long as the rates of transportation are entirely discretionary with the States, such a stipulation is clearly within their reserved powers." [25]

No authorities were cited for the decision of the court. The brief dissenting opinion of Mr. Justice Miller was as follows:

"I am of opinion that the statute of Maryland requiring the railroad company to pay into the treasury of the State one-fifth of the amount received by it from passengers on the branch of the road between Baltimore and Washington, confined as it is exclusively to passengers on that branch of the road, was intended to raise a revenue for the State from all persons coming to Washington by rail, and had that effect for twenty-five years, and that the statute is, therefore, void within the principle laid down by this court in *Crandall* v. *Nevada*." [26]

The foregoing cases involved taxation on domestic corporations. The absolute power of the state was founded on the fact that it might have declined to create the corporation. The franchise that could be denied could be taxed as the state pleases. In *Maine* v. *Grand Trunk Railway Co.*[27] the same doctrine was applied to a foreign corporation which had leased the rights and privileges of a domestic corporation. The statute under which the tax was levied imposed on every corporation, person, or association operating a railroad in the state "an annual excise tax for the privilege of exercising its franchises." The majority held that the tax was levied on a privilege entirely within the discretion of the state to grant or withhold, and that the "character of the tax, or its validity, is not determined by the mode adopted in fixing its amount." [28] The amount of the tax in question was determined by applying the statutory rate to a sum ascertained by multiplying the average receipts per mile over the whole system of the road by the number of miles in the state. This measure clearly included receipts from interstate, as well as from intra-state, commerce. The minority, consisting of Justices Bradley, Harlan, Lamar, and Brown, maintained that the tax, though called one on a franchise, was, in fact, one on the receipts of the company derived from international transportation. The precedents on which they relied involved taxes

[25] 21 Wall. 456, 473 (1875).
[26] 21 Wall. 456, 475 (1875).
[27] 142 U. S. 217, 12 Sup. Ct. Rep. 121 (1891).
[28] 142 U. S. 217, 228, 12 Sup. Ct. Rep. 121 (1891).

imposed, not on some privilege within the grant of the state, but on receipts from interstate commerce,[29] or on engaging in a specified business which was in part interstate commerce.[30] In these cases the subject on which the tax was levied was held to be beyond the power of the state. The majority, on the other hand, rested the decision on the authority of *Home Ins. Co.* v. *New York*,[31] sustaining a tax on the franchise of a domestic corporation. They must therefore have regarded the tax as imposed on the privilege of a foreign corporation either to succeed to the rights of a domestic corporation, or to be admitted to the state to carry on intra-state commerce, for these were the only privileges which the state might have withheld. The language of the statute is sufficiently broad to bring the case within the authority of the precedents relied on by the minority. But the difference of opinion on this point does not affect the authority of the case for the proposition that the validity of the tax depends on the subject on which it is levied, and not on the measure by which its amount is determined. "There is," said Mr. Justice Field for the majority, "no levy by the statute on the receipts themselves, either in form or fact; they constitute, as said above, simply the means of ascertaining the value of the privilege conferred." [32]

In *Ashley* v. *Ryan*[33] the court sustained unanimously a statute of Ohio which required a fee for filing with the secretary of the state, articles of agreements of consolidation of different corporations. The amount of the fee was fixed by a small percentage of the total capital stock, and it was alleged that this requirement was a regulation of interstate commerce. In view of subsequent decisions, the opinion of Mr. Justice White is of more than usual importance. He presents the theory underlying the decision as follows:

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[29] Philadelphia & Southern Mail S. S. Co. *v.* Pennsylvania, note 5, *supra.*

[30] Crutcher *v.* Kentucky, note 5, *supra;* Leloup *v.* Port of Mobile, note 5, *supra;* Pickard *v.* Pullman Southern Car Co., 117 U. S. 34, 6 Sup. Ct. Rep. 635 (1886); Norfolk & W. R. Co. *v.* Pennsylvania, 136 U. S. 114, 10 Sup. Ct. Rep. 958 (1890).

[31] 134 U. S. 594, 10 Sup. Ct. Rep. 593 (1889). Though the tax was measured by the capital stock, part of which was invested in United States bonds, it was held not to be an unconstitutional interference with the federal borrowing paper. See pages 334–35, *supra.*

[32] 142 U. S. 217, 229, 12 Sup. Ct. Rep. 121 (1891). For a re-interpretation of the Maine Case, see Galveston, H. & S. A. R. Co. *v.* Texas, note 41, *infra.*

[33] 153 U. S. 436, 14 Sup. Ct. Rep. 865 (1894).

"The purpose of the tender of the articles of consolidation to the Secretary of State was to secure to the consolidated company certain powers, immunities, and privileges which appertain to a corporation under the laws of Ohio. The rights thus sought could only be acquired by the grant of the State of Ohio, and depended for their existence upon the provisions of its laws. Without that State's consent they could not have been procured. . . .

"Hence, in seeking to file its articles of incorporation, the company was applying for privileges, immunities, and powers which it could by no means possess, save by the grace and favor of the constitution of the State of Ohio and the statutory provisions passed in accordance therewith. At the time the articles were presented for filing, the statute law of the State charged the parties with notice that the benefits which it was sought to procure could not be obtained without payment of the sum which the Secretary of State exacted. As it was within the discretion of the State to withhold or grant the privilege of exercising corporate existence, it was, as a necessary resultant, also within its power to impose whatever conditions it might deem fit as prerequisite to corporate life. The act of filing, constituting, as it did, a claim of a right to the franchise granted by the state law, carried with it a voluntary assumption of any burden with which the privilege was accompanied, and without which the right of corporate existence could not have been procured. We say *voluntary* assumption, because, as the claim of the franchise was voluntary, the assumption of the privilege which resulted from it partook necessarily of the nature of the claim for corporate existence. Having thus accepted the act of grace of the State and taken the advantages which sprang from it, the company cannot be permitted to hold on to the privilege or right granted, and at the same time repudiate the condition by the performance of which it could alone obtain the privilege which it sought. . . .

"It follows from these principles that a State, in granting a corporate privilege to its own citizens, or, what is equivalent thereto, in permitting a foreign corporation to become one of the constituent elements of a consolidated corporation organized under its laws, may impose such conditions as it deems proper, and that the acceptance of the franchise in either case implies a submission to the conditions without which the franchise could not have been obtained." [34]

Ten years later, in two unanimous decisions, the Supreme Court sustained taxes on the local business of foreign corporations and dismissed as immaterial the contentions that, because the taxes

[34] 153 U. S. 436, 440–43, 14 Sup. Ct. Rep. 865 (1894).

imposed economic burdens on interstate commerce, they were therefore invalid regulations of such commerce. *Pullman Co.* v. *Adams*[35] involved a tax on sleeping-car companies carrying passengers from one point to another within the state. The tax was $100, plus twenty-five cents per mile for each mile of railroad track over which the company runs. The company offered to show that the receipts from intra-state passengers did not equal the expenses chargeable against such receipts. On the assumption that the company was legally free to abandon its intra-state business,[36] the court held that it was not important that there were no profits on that business, and that the tax would have to be paid from interstate receipts, saying: "The company cannot complain of being taxed for the privilege of doing local business which it is free to renounce. Both parties agree that the tax is a privilege tax." [37]

Pullman Co. v. *Adams* was quoted with approval in *Allen* v. *Pullman's Palace Car Co.*,[38] which sustained a tax of $3,000 on sleeping-car companies for one or more passengers taken up at one point in the state and delivered at another point within the state. But, in rejecting the contention that, since the intra-state business was such a small part of the total business, the statute was but a thinly disguised attempt to tax the privilege of interstate traffic, Mr. Justice Day remarked:

"If the payment of this tax was compulsory upon the company before it could do a carrying business within the state, and the burden of its payment, because of the minor character of the domestic traffic, rested mainly upon the receipts from interstate traffic, there would be much force in this objection." [39]

This reference to the possible significance of the economic burden on interstate commerce must be taken as merely a qualification of the implication that the state cannot require payment of a tax on intra-state commerce as a condition of continuing to engage in interstate commerce; for the passage in the opinion immediately following that quoted above reads as follows:

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[35] 189 U. S. 420, 23 Sup. Ct. Rep. 494 (1903).

[36] This assumption was based on the interpretation of the state constitution given by the state court.

[37] 189 U. S. 420, 422, 23 Sup. Ct. Rep. 494 (1903).

[38] 191 U. S. 171, 24 Sup. Ct. Rep. 39 (1903).

[39] 191 U. S. 171, 181, 24 Sup. Ct. Rep. 39 (1903).

"Upon this proposition we are unable to distinguish this case from *Pullman Co.* v. *Adams*, 189 U. S. 420, 47 L. Ed. 877, 23 Sup. Ct. Rep. 494, decided at the last term, wherein it was held that the privilege tax imposed by the state of Mississippi, upon each car carrying passengers from one point in the state to another therein, was a valid tax, notwithstanding the fact that the company offered to show that its receipts from the carrying of the passengers named did not equal the expenses chargeable against such receipts. This conclusion was based upon the right of the company to abandon the business if it saw fit." [40]

It is obvious from these two decisions that the court was still interested exclusively in the legal *res* which was the subject of the tax. The next case to be considered is *Galveston, H. & S. A. R. Co.* v. *Texas*,[41] decided five years later. The tax there in issue was imposed on railroad corporations and other persons owning or controlling any line of railroad wholly within the state. Neither the majority nor the minority treated the tax as on a privilege within the power of the state to withhold. The minority deemed it an occupation tax and valid, in spite of the fact that the measure of the tax included receipts from interstate commerce. The majority held that the tax was imposed directly on the receipts, and was therefore invalid. Both majority and minority were looking merely at the subject on which the tax was laid, although Mr. Justice Holmes for the majority declared that, "neither the state courts nor the legislatures, by giving a tax a particular name or by the use of some form of words, can take away our duty to consider its nature and effect." [42] Fuller consideration of the case will be given in a later section dealing with taxes on occupations. Attention is called to it at this point for the bearing which the division of opinion among the judges has on the next case to be considered. In the Galveston Case the majority was composed of Mr. Justice Holmes, who wrote the opinion, and Justices Brewer, Peckham, Day, and Moody. The dissenting judges were Mr. Justice Harlan, who wrote the opinion, and Chief Justice Fuller, and Justices White and McKenna.

[40] 191 U. S. 171, 181–82, 24 Sup. Ct. Rep. 39 (1903).
[41] 210 U. S. 217, 28 Sup. Ct. Rep. 638 (1908).
[42] 210 U. S. 217, 227, 28 Sup. Ct. Rep. 638 (1908).

(b) *The Modification of the Doctrine of Unlimited Power*

Thus far, as we have seen, the doctrine that a state may tax as it pleases any privilege that it may withhold has always had the assent of a majority of the Supreme Court. But in 1910 came two decisions which seem to mark a new departure. The majority seems to have become a minority. This conclusion, however, cannot be stated with certainty, since in both these cases, *Western Union Telegraph Co.* v. *Kansas*[43] and *Pullman Co.* v. *Kansas*,[44] the majority of the court did not fully agree in the reasons for their decision. Mr. Justice Harlan wrote the opinion of the court in both cases. With him concurred Justices Brewer and Day. Mr. Justice White filed separate concurring opinions. Both Mr. Justice Moody and Mr. Justice Peckham were absent from the bench on account of illness when the cases were decided. But it was announced that the former approved of Mr. Justice Harlan's opinion in the Western Union Case, and that the latter agreed with the minority. Mr. Justice Holmes wrote dissenting opinions in the two cases, in which opinions Chief Justice Fuller concurred. Mr. Justice McKenna concurred in the dissenting opinion in the Kansas Case, and his dissent in the Pullman Case was separately recorded.

The tax involved in the two cases was measured by applying scheduled rates to the total capital stock. So far as the wording of the statute indicates, it was imposed on all corporations, domestic and foreign, exercising their corporate powers within the state. But, as the case came before the court, both the majority and minority treated the question as one involving the propriety of the exaction on foreign corporations as a condition of doing local business within the state. Kansas had obtained decrees in her own supreme court, ousting and restraining the corporations from doing any business that was wholly internal to the state and not pursuant to some arrangement with the federal government. The basis for the decree was the non-payment of the tax. The question before the Supreme Court was whether ouster from all purely local business in default of such payment was a regulation of interstate commerce.

The precise issue which the court had to meet will be made clearer by quotations from the dissenting opinions of Mr. Justice

[43] 216 U. S. 1, 30 Sup. Ct. Rep. 190 (1910).

[44] 216 U. S. 56, 30 Sup. Ct. Rep. 232 (1910).

Holmes. In the Western Union Case he says: "I confess my inability to understand how a condition can be unconstitutional when attached to a matter over which the state has absolute arbitrary power." [45] He points out that Kansas has not attempted to impose an absolute liability, but has merely said that if the company wishes to do local business it must pay a certain sum.

"It does not matter if the sum is extravagant. Even in the law the whole generally includes its parts. If the state may prohibit, it may prohibit with the privilege of avoiding the prohibition in a certain way. . . . I quite agree that we must look through form to substance. The whole matter is left in the Western Union's hands. If the license fee is more than the local business will bear, it can stop that business and avoid the fee. . . . If the imposition were absolute, or if the attempt were to oust the corporation from the state if it did not pay, the arguments that prevail would be apposite. But the state seeks only to oust the corporation from that part of its business that the corporation has no right to do unless the state gives leave." [46]

Mr. Justice Holmes recognizes that "the local and interstate business may be necessary each to the other to make the whole pay." [47] But this he dismisses as immaterial, on the ground that "to deny the right of Kansas to do as it chooses with the local business is to require the local business to help sustain that between the states." [48] This point he reinforces in the Pullman Case: [49]

"I am quite unable to believe that an otherwise lawful exclusion from doing business within a state becomes an unlawful or unconstitutional burden on commerce among states because, if it were let in, it would help to pay the bills. Such an exclusion is not a burden on the foreign commerce at all; it simply is the denial of a collateral benefit. If foreign commerce does not pay its way by itself, I see no right to demand an entrance for domestic business to help it out."

In concluding his opinion the learned justice goes back to the *dicta* of Chief Justice Marshall for support:

"That the local business of telegraph and railroad companies may be taxed by the states has been held over and over again, with full accept-

[45] 216 U. S. 1, 54, 30 Sup. Ct. Rep. 190 (1910).
[46] 216 U. S. 1, 53, 30 Sup. Ct. Rep. 190 (1910).
[47] *Ibid.*
[48] 216 U. S. 1, 54, 30 Sup. Ct. Rep. 190 (1910).
[49] 216 U. S. 56, 76, 30 Sup. Ct. Rep. 232 (1910).

ance of the doctrine that *quoad hoc*, 'the power to tax involves the power to destroy' (*M'Culloch* v. *Maryland*, 4 Wheat. 316, 431, 4 Law Ed. 579, 697), — essentially the doctrine on which the power of the states to tax interstate commerce was denied. . . .

"I do not see how the reasoning that denies the power of the State to tax one kind of commerce (interstate) and asserts it with regard to the other (intra-state) can be reconciled with the denial of the power of the state to exclude the latter altogether, or to tax it for whatever sum it likes. The right to tax 'in its nature acknowledges no limits.'" [50]

There can be no doubt that Mr. Justice Holmes is correctly applying the reasoning of many of his predecessors. If such reasoning was essential to the decisions, he seems on firm ground when he says that he thinks "the tax in question . . . was lawful under all the decisions of this court until last week." [51] The majority can escape from the force of Mr. Justice Holmes's appeal to authority only by breaking entirely new paths, or by showing that the precise question before them differs from those involved in the earlier decisions. Both of these methods are adopted.

Mr. Justice White in his concurring opinion in the Western Union Case makes no reference to any of the precedents. He lays emphasis upon the fact that the Western Union Company has been doing both local and interstate business in Kansas for a long time; that it came in as the result of the implied invitation or tacit consent of the state; that it had expended large sums of money in the state, and that its investment was still there; that the continued beneficial existence of the investment depended upon the right to use the property for the purpose for which it was acquired, *i. e.*, for both interstate and local business. These facts he brings to bear upon the contention of the state that the tax is not a burden on interstate commerce, because the company may avoid the tax by abandoning its local business. The abandonment of the local business, he says, would result in rendering worthless and, in effect, confiscating the property established for the purpose of doing such local business. He held, therefore, that this was no case for the doctrine of election or voluntary assumption of an unconstitutional burden.

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[50] 216 U. S. 56, 76, 77, 30 Sup. Ct. Rep. 232 (1910).

[51] 216 U. S. 56, 77, 30 Sup. Ct. Rep. 232 (1910).

"The investment is there, and its magnitude, it is fair to assume, is, in part, a resultant of the requirements of the local business. The continued beneficial existence of the investment depends upon the right to use the property for the purpose for which it was acquired, that is, for both interstate and local business. The state law takes the property, or what is equivalent thereto, imposes an unconstitutional and confiscatory burden, upon the condition that such burden be discharged or the local business be abandoned. What possible election can there be? The property is in the State. It has been invested therein for the very purpose of doing local as well as other business. If the unconstitutional burden be not assumed, local business must cease, and hence the property established for the purpose of doing the local business becomes worthless and is in effect confiscated. If, on the other hand, the unconstitutional burden be borne, a like result takes place. . . . The view taken by me does not deprive the State of power to exert its authority over the corporation and its property in the amplest way subject to constitutional limitations. It simply prevents the State from driving out the corporation which is in the State by imposing upon it arbitrary and unconstitutional conditions, when upon no possible theory could the right to exact them exist, except upon the assumption that the corporation is not in the State, and that the illegal exactions are the price of the privilege of allowing it to come in." [52]

This position of Mr. Justice White seems to be based on the due-process clause rather than on the commerce clause. Mr. Justice Holmes meets it as follows:

"Finally, in the absence of contract, the power of the state is not affected by the fact that the corporation concerned already is in the state, or even has been there for some time. . . . Whatever the corporation may do or acquire there is infected with the original dependence upon the will of the state. . . . But furthermore, it is a short answer to this part of the argument that, in the present case, according to the decisions relied upon by the majority, the state could not have prevented the entry of the corporation, because it entered for the purpose of commerce with other states." [53]

The debate between Mr. Justice White and Mr. Justice Holmes is continued in their opinions in the Pullman Case. The former concedes the general principle relied on by his colleague. Wherever

[52] 216 U. S. 1, 50–51, 30 Sup. Ct. Rep. 190 (1910).
[53] 216 U. S. 1, 55–56, 30 Sup. Ct. Rep. 190 (1910).

the state has the absolute power to exclude, he says, it may impose such conditions as it pleases on the right to come in. If "a foreign corporation avails of such a right, it may not assail the constitutionality of the condition because, by accepting the privilege, it has voluntarily consented to be bound by the conditions." [54] In such a case, "the absolute power of the state is the determining factor, and the validity of the condition is immaterial." [55] But this principle is said to have no application to a foreign corporation engaged in interstate commerce, for its right to come into the state to engage in such commerce is independent of the will of the state. "The power to exclude in such a case being only relative, affords no warrant for the exertion by the state of an absolute prohibition." [56] The learned justice goes so far as to say that "where the right to do an interstate business exists, without regard to the assent of the state, a state law which arbitrarily forbids a corporation from carrying on with its interstate business a local business would be a direct burden upon interstate commerce," [57] and in conflict with the principle that "a state may not exert its concededly lawful powers in such a manner as to impose a direct burden on interstate commerce." [58]

As to this last point, Mr. Justice Holmes replies that it seems to him "a proposition not to be assumed, but to be proved." [59] And he rejects it. And with respect to his colleague's distinction between absolute and relative powers of exclusion, he observes:

"I do not see how or why the right of a state to exclude a corporation from internal traffic is complicated or affected in any way by the fact that the corporation has a right to come in for another purpose. It is said that in such a case the power of the state is only relative, and in the sense that it is confined to the local business, I agree. But, in the sense that it is not absolute over that local business, the statement seems to me merely to beg the question that is discussed. I do not see why the power is less absolute over that because it does not extend to something else." [60]

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[54] 216 U. S. 56, 66, 30 Sup. Ct. Rep. 232 (1910).
[55] *Ibid.*
[56] 216 U. S. 56, 68, 30 Sup. Ct. Rep. 232 (1910).
[57] *Ibid.*
[58] 216 U. S. 56, 65, 30 Sup. Ct. Rep. 232 (1910).
[59] 216 U. S. 56, 76, 30 Sup. Ct. Rep. 232 (1910).
[60] 216 U. S. 56, 77, 30 Sup. Ct. Rep. 232 (1910).

Here, again, Mr. Justice Holmes follows faithfully the footsteps of his forerunners. Mr. Justice White is opening new paths. He says, in effect, that the right of the state to exclude a foreign corporation from doing local business in connection with interstate business ought not to be recognized, because the inability to carry on local business in connection with the interstate business imposes a direct burden on interstate commerce. The extent to which this is true will of course depend on the kind of business in question. It will appear that in the Western Union Case and in the decisions which have followed it, the determination of the question whether the tax is a regulation of interstate commerce is dependent on the nature of the business in question,[61] as well as on the measure by which the amount of the tax is determined.

Mr. Justice Harlan's opinion for the court in the Western Union Case took a somewhat broader ground than that chosen by Mr. Justice White. It stands for the more general proposition that, wherever the abandonment of local business would appreciably increase the cost of conducting the interstate business, the state cannot measure a tax on the local business by a method which results in imposing a substantial burden on the interstate business. In reply to the claim that the state had no intention to embarrass interstate commerce, but only to prevent the company from doing local business without complying with the statute, it was said:

"But the disavowal by the State of any purpose to burden interstate commerce cannot conclude the question as to the fact of such a burden being imposed, or as to the unconstitutionality of the statute as shown by its necessary operation upon interstate commerce. If the statute, reasonably interpreted, either directly or by its necessary operation, burdens interstate commerce, it must be adjudged to be invalid, whatever may have been the purpose for which it was enacted, and although the company may do both interstate and local business. This court has repeatedly adjudged that in all such matters the judiciary will not regard mere forms, but will look through forms to the substance of things. . . .[62]

"The right of the Telegraph Company to continue the transaction of local business in Kansas could not be made to depend upon its submission to a condition prescribed by that State, which was hostile both to the letter and spirit of the Constitution. The company was not

[61] This was in type before the author had received the advance sheets containing the opinion in Looney *v.* Crane Co., note 114, *infra*. See pages 600–618, *infra*.

[62] 216 U. S. 1, 27, 30 Sup. Ct. Rep. 190 (1910).

bound, under any circumstances, to surrender its constitutional exemption from state taxation, direct or indirect, in respect of its interstate business and its property outside of the State, any more than it would have been bound to surrender any other right secured by the National Constitution." [63]

The opinion thus stands for the doctrine, that when the measure adopted for determining the amount of a tax on the privilege of doing local business is such as in reality to impose a burden on interstate commerce, that measure cannot be constitutionally applied. The power to burden interstate commerce does not exist merely because of the general power of the state to exclude a corporation from doing local business.

In every case, then, the question at issue is whether a tax imposed by the state really burdens interstate commerce. Whether it does so will depend not only upon the measure by which the amount of the tax is determined, but also upon the character of the business to which the tax is applied.[64] In *Pullman Co.* v. *Adams*[65] the decision was based on the assumption that the company was legally free to abandon its local business. The court stated that, if such were not the case, the tax would be invalid. No consideration was given to the fact that the abandonment of local business might result in such economic loss to the interstate business, that the legal freedom to abandon the local business would not be exercised, even though the tax on the local business exceeded the net income from that business. In *Western Union Telegraph Co.* v. *Kansas*,[66] however, the court looked at the contention that the corporation might escape the tax by abandoning its local business, not from the standpoint of the legal possibility of such abandonment, but from the standpoint of its economic effect. If the company could not abandon its local business without economic loss to its interstate business, the state cannot impose a tax on the local business which is in reality a burden on the interstate business. In the language of Mr. Justice Harlan:

"We cannot fail to recognize the intimate connection which, at this day, exists between the interstate business done by interstate companies and the local business which, for the convenience of the people, must be

[63] 216 U. S. 1, 47–48, 30 Sup. Ct. Rep. 190 (1910).
[64] See note [61], *supra*.
[65] Note 35, *supra*.
[66] Note 43, *supra*.

done or can generally be better and more economically done by such interstate companies rather than by domestic companies organized to conduct only local business.[67]

"The state knows that the Telegraph Company, in order to accommodate the general public and make its telegraphic system effective, must do all kinds of telegraphic business. Yet, it seeks to enforce a regulation requiring the company by paying the 'fee' in question to assent to its interstate business being burdened and its property outside of Kansas being taxed in order that it may continue to conduct a business concededly beneficial to the public — a right lawfully acquired from the United States when Kansas was a Territory, and exercised, consistently with the statutes of the State for many years after Kansas was admitted as a State of the Union. . . .[68]

"It is easy to be seen that if every State should pass a statute similar to that enacted by Kansas not only the freedom of interstate commerce would be destroyed, the decisions of this court nullified and the business of the country thrown into confusion, but each State would continue to meet its own local expenses, not only by exactions that directly burdened such commerce but by taxation upon property situated beyond its limits." [69]

Owing to the difference between the opinion of Mr. Justice Harlan and that of Mr. Justice White, it is difficult to state the proposition for which the Western Union Case and the Pullman Case stand. Mr. Justice White's opinion in the Pullman Case would seem to indicate that he would permit Kansas to impose such taxes as it pleases on domestic corporate franchises. Yet he said in the Western Union Case that he did "not wish to be understood as dissenting in any respect from the fundamental principle which the opinion of the court embodies and applies." [70] Yet the fundamental principle of that opinion is directly opposed to the fundamental principle of Mr. Justice White's opinion in *Ashley* v. *Ryan*.[71] But the learned justice tells us that the doctrine of

[67] 216 U. S. 1, 37, 30 Sup. Ct. Rep. 190 (1910).

[68] 216 U. S. 1, 33, 30 Sup. Ct. Rep. 190 (1910).

[69] 216 U. S. 1, 37, 30 Sup. Ct. Rep. 190 (1910).

[70] 216 U. S. 1, 52, 30 Sup. Ct. Rep. 190 (1910).

[71] Note 33, *supra*. In a *dictum* in his opinion in the Western Union Case Mr. Justice Harlan makes it evident that he would apply the doctrine of the decision to domestic corporations engaged in other kinds of interstate commerce than transportation. At 216 U. S. 1, 36–37, 30 Sup. Ct. Rep. 190 (1910), he says:

"If a domestic corporation engaged in the business of soliciting orders for goods manufactured, sold, and delivered in a State, should in addition solicit orders for goods

some of the earlier cases in which he concurred did not represent his individual convictions.

"When first after the duty came to me of taking part in the work of the court the question arose of the right of a State in cases where it had absolute authority to impose an unconstitutional condition as a prerequisite to the right to do local business, my individual convictions were suppressed and my opinion yielded because of the conception that it was my duty to enforce in such a case the previous rulings of the court, however much as an original question I would have held a contrary view. But because my convictions were thus yielded in such a case affords no reason why I now should assent to extending the doctrine of the previous cases to conditions to which, in my opinion, they do not apply." [72]

Mr. Justice Harlan does not recognize that his opinion is in any way inconsistent with previous decisions. He prefaces his analysis of the situation involved in the case at bar with an extended review of earlier decisions. But these were cases in which the court held that the tax was imposed on a subject itself interstate commerce.[73] He dismisses the contention that earlier cases had established that a state may impose on foreign corporations such terms as it pleases, by pointing out that "those were cases in which the particular foreign corporation before the court was engaged in ordinary business, and not directly or regularly in interstate or foreign commerce." [74] *Pullman Co.* v. *Adams* [75] he explains by saying that the tax there involved was not at all disproportioned to the

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manufactured in and to be brought from another State for delivery, could the former State make it a *condition* of the right to engage in local business within its limits that the corporation pay a given percentage of *all* fees or commissions received by it in its business, interstate and domestic? There can be but one answer to this question, namely, that such a condition would operate as a direct burden on interstate commerce, and therefore would be unconstitutional and void. Consistently with the Constitution, no court could, by any form of decree, recognize or give effect to or enforce such a condition."

This *dictum* is directly contrary to Ficklen *v.* Shelby County Taxing District, 145 U. S. 1, 12 Sup. Ct. Rep. 810 (1892). In that case, however, Mr. Justice Harlan dissented.

[72] 216 U. S. 56, 74, 30 Sup. Ct. Rep. 232 (1910).

[73] McCall *v.* California, note 5, *supra;* Crutcher *v.* Kentucky, note 5, *supra;* Gloucester Ferry Co. *v.* Pennsylvania, note 5, *supra;* Leloup *v.* Port of Mobile, note 5, *supra;* Galveston, H. & S. A. R. Co. *v.* Texas, note 41, *supra;* Henderson *v.* New York, 92 U. S. 950 (1875); Brimmer *v.* Rebman, 138 U. S. 78, 11 Sup. Ct. Rep. 213 (1891).

[74] 216 U. S. 1, 33, 30 Sup. Ct. Rep. 190 (1910).

[75] Note 35, *supra.*

local business, and was, therefore, "not to be regarded as a mere device to reach or burden the interstate commerce of the company." *Allen* v. *Pullman's Palace Car Co.*[76] he dismisses by quoting from the opinion to the effect, that the statute sustained "applied 'strictly to business done (by sleeping-car companies) in the transportation of passengers taken up at one point in the state and transported wholly within the state to another point therein.'"[77] But what the opinion in that case said of the statute was that "*its terms* apply strictly," etc.[78] Clearly both the Adams Case and the Allen Case were decided on the theory that any economic burden imposed by the taxes on interstate commerce was immaterial, so long as the company was free to abandon the local business. Very likely the taxes might have been sustained on the theory that the burden on interstate commerce was not sufficiently serious to be controlling. But this was not the theory adopted and applied. Though the Western Union Case and the Pullman Case may not require any overruling of earlier decisions, they plainly mark the abandonment of earlier doctrines. Notwithstanding the differences of opinion among the judges who constituted the majority of the court, the Western Union Case and the Pullman Case clearly decide that a tax on the right of a foreign corporation to do local business may by reason of its economic effect on interstate commerce be a regulation of that commerce. With the establishment of this doctrine, the court is compelled to consider the economic effect on interstate commerce of every tax complained of.[79] But neither in the Western Union Case nor in the Pullman Case was it inquired whether the specific amount of the tax in question was disproportionate to the value of the privilege of doing local business. No reference was made to the amount of local business. The theory of the majority seemed to be that it was unconstitutional to apply the measure of total authorized capital, even though the rate applied to that amount was infinitesimal. The rates specified in the Kansas statute started at one-tenth of one per cent on the first $100,000 and diminished as the capital was larger. The Western Union Company was taxed $20,100 on an authorized

[76] Note 38, *supra*.

[77] 216 U. S. 1, 44, 30 Sup. Ct. Rep. 190 (1910).

[78] 191 U. S. 171, 180, 24 Sup. Ct. Rep. 39 (1903).

[79] See note [61], *supra*.

capital of $100,000,000. Mr. Justice Holmes remarked in his dissenting opinion:

"If, after this decision, the state of Kansas, without giving any reason, sees fit simply to prohibit the Western Union Telegraph Company from doing any more local business there, or from doing local business until it has paid $20,100 I shall be curious to see upon what ground that legislation will be assailed." [80]

In the Pullman Case the company was taxed $14,800 on an authorized capital of $74,000,000. In *Ludwig* v. *Western Union Telegraph Co.*,[81] decided at the same term, the company escaped from the payment of $25,050 on its authorized capital of $100,000,000. This case arose under an Arkansas statute which adopted the measure of the authorized capital stock. It would seem that, unless certain measures are to be deemed invalid whatever their economic effect on interstate commerce,[82] the court should in each case consider the rate as well as the measure, should ascertain the value of the local business, and should judge whether the sum actually charged for the privilege of conducting that business is moderate or excessive.

Some of these elements were touched upon in *Atchison, T. & S. F. R. Co.* v. *O'Connor*,[83] which declared invalid a Colorado tax of two cents per $1,000 on the capital stock of a foreign corporation. The decision was unanimous, indicating that all the court accepted the doctrine of the Western Union Case as definitely established. Mr. Justice Holmes, who wrote the opinion, referred to the fact that the greater part of the property and business of the Kansas corporation seeking to escape from the Colorado tax "is outside the state of Colorado, and of the business done within the state but a small proportion is local, the greater part being commerce among the states." [84]

In *Baltic Mining Co.* v. *Massachusetts*,[85] decided in 1913, the nature of the business and the amount of the tax receive more

[80] 216 U. S. 1, 54–55, 30 Sup. Ct. Rep. 190 (1910).

[81] 216 U. S. 146, 30 Sup. Ct. Rep. 280 (1910).

[82] This appears to be the conclusion of the Supreme Court with reference to the measure of total capital stock, with no maximum limitation where applied to taxes on foreign corporation. See pages 600–618, *infra*.

[83] 223 U. S. 280, 32 Sup. Ct. Rep. 216 (1912).

[84] 223 U. S. 280, 285, 32 Sup. Ct. Rep. 216 (1912).

[85] 231 U. S. 68, 34 Sup. Ct. Rep. 15 (1913).

specific consideration. In that case an excise tax measured by the total authorized capital, with a proviso that the annual imposition should not exceed $2,000, was held not to be a burden on interstate commerce when applied to the two corporations whose rights were there in question. One of these corporations was the Baltic Mining Company, which had no property in the state except current bank deposits and a certificate for $80,000 in the stock of another corporation. The other corporation, the S. S. White Dental Company, had in the state no real estate except a leasehold interest; it did no manufacturing in the state; its only property in the state consisted of about $100,000 in stock, fixtures, and bank deposits. In the case of each of these corporations, the authorized capital by which the tax was measured was only one-fifth, or thereabouts, of their entire assets. Mr. Justice Day, who wrote the opinion, stated that the court had no disposition to limit the authority of the Western Union Case or the Pullman Case, but added that "every case involving the validity of a tax must be decided on its own facts," [86] and that therefore "the facts upon which these cases were decided must not be lost sight of in deciding other and alleged similar cases." [87] He then proceeded to point out the differences between the Kansas and Massachusetts statutes [88] and between the business of the complainants and that of the objectors in the Kansas cases.[89] After considering these differences he said:

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[86] 231 U. S. 68, 85, 34 Sup. Ct. Rep. 15 (1913).

[87] *Ibid.*

[88] In addition to the difference due to the fixing of a $2,000 maximum in the Massachusetts statute, Mr. Justice Day refers to the fact that the authorized capital of the two corporations subjected to the Massachusetts tax is in each case about one-fifth of their total assets. 231 U. S. 68, 87, 34 Sup. Ct. Rep. 15 (1913).

[89] "In the Kansas cases the business of both complaining companies was commerce, the same instrumentalities and the same agencies carrying on in the same places the business of the companies of state and interstate character. In the Western U. Tel. Co. Case, the company had a large amount of property permanently located within the state, and between 800 and 900 offices constantly carrying on both state and interstate business. The Pullman Company had been running a large number of cars within the state, in state and interstate business, for many years. There was no attempt to separate the intra-state business from the interstate business by the limitations of state lines in its prosecution." 231 U. S. 68, 85–86, 34 Sup. Ct. Rep. 15 (1913).

"In the cases at bar the business for which the companies are chartered is not, of itself, commerce. True it is that their products are sold and shipped in interstate commerce, and to that extent they are engaged in the business of carrying on interstate commerce, and are entitled to the protection of the Federal Constitution against

"The conclusion, therefore, that the authorized capital is only used as the measure of the tax, in itself lawful, without the necessary effect of burdening interstate commerce, brings the legislation within the authority of the state. So, if the tax is, as we hold it to be, levied upon a legitimate subject of such taxation, it is not void because imposed upon property beyond the state's jurisdiction, for the property itself is not taxed. In so far as it is represented in the authorized capital stock, it is only used as a measure of taxation, and, as we have seen, such measure may be found in property or in the receipts from property not in themselves taxable." [90]

Thus it appears that a state may still measure taxes on lawful subjects by receipts or capital stock which it cannot tax directly. But of course a significant feature of the Massachusetts statute was the provision that the tax should in no event exceed $2,000. Chief Justice White, and Justices Van Devanter and Pitney, dissented from the decision, but without filing an opinion.

After the decisions in *Western Union Telegraph Co.* v. *Kansas* [91] and *Ludwig* v. *Western Union Telegraph Co.*,[92] Kansas and Arkansas changed their statutes. The Kansas statute with respect to foreign corporations, as interpreted by the state court, referred, for the measure of the tax, only to that proportion of the total paid-up capital stock which was represented by property in Kansas employed in purely local business. It also limited the annual imposition to $2,500. In *Lusk* v. *Botkin*,[93] a tax of this amount on a foreign railway company doing business in Kansas was sustained. The Arkansas statute was similar, except that there was no maximum limit to the tax that might be charged. In *St. Louis S. W. Ry. Co.* v. *Arkansas* [94] this statute was sustained and a tax of

laws burdening commerce of that character. Interstate commerce of all kinds is within the protection of the Constitution of the United States, and it is not within the authority of a state to tax it by burdensome laws. From the statement of facts it is apparent, however, that each of the corporations in question is carrying on a purely local and domestic business, quite separate from its interstate transactions. That local and domestic business, for the privilege of doing which the state has imposed a tax, is real and substantial, and not so connected with interstate commerce as to render a tax upon it a burden upon the interstate business of the companies involved." 231 U. S. 68, 86, 34 Sup. Ct. Rep. 15 (1913).

[90] 231 U. S. 68, 87, 34 Sup. Ct. Rep. 15 (1913).

[91] Note 43, *supra*.

[92] Note 81, *supra*.

[93] 240 U. S. 236, 36 Sup. Ct. Rep. 263 (1916).

[94] 235 U. S. 350, 35 Sup. Ct. Rep. 99 (1914).

$6798.26 imposed on a foreign corporation whose property owned and used in the state for intra-state business was valued at $13,586,-520. These two cases would seem to indicate that the Massachusetts statute involved in the Baltic Case might also be applied to a foreign railroad company. The court might, however, draw a distinction between the cases and hold that, in spite of a provision for a maximum, a tax which refers for a measure to total capital stock cannot be applied to a corporation engaged in transportation, and using the same facilities for local and interstate business in such a manner that the abandonment of local business would not proportionately decrease operating costs. Whether, in such a case, the provision for a maximum would remove the difficulty inherent in selecting the total capital stock as a measure ought in common sense to depend on the maximum set. It would certainly be going far to say that a tax of $2,000 on the right of a foreign railroad corporation to do local business was invalid, merely because the total capital was taken as a basis for determining the exact amount of any levy of less than $2,000.[95]

On the same day that *Lusk* v. *Botkin* [96] was decided, the Supreme Court, in *Kansas City, F. S. & M. R. Co.* v. *Botkin*,[97] held applicable to a railroad corporation chartered in the state of Kansas a Kansas statute, imposing on the privilege of being a corporation a fee which was graduated according to the amount of paid-up capital stock, with a proviso that the maximum should be $2,500. Thus it appeared that, so far at least as domestic corporations are concerned, the selection of total capital stock as a measure is cured by a provision for a reasonable maximum, even though the corporation is engaged in transportation. The opinion left the reader in doubt as to the importance of the provision for a maximum. It seemed to assume that the doctrine of *Western Union Telegraph Co.* v. *Kansas* [98] applies to taxes on the franchises of domestic corporations. Its silence on this point might be taken to obliterate the distinction between taxes on domestic corporations and those on foreign corporations, which was relied on by Mr. Justice White to exclude the issue in *Pullman Co.* v. *Kansas*,[99] from the prece-

[95] But see Albert Pick & Co. *v.* Jordan, 169 Cal. 1, 16–17, 20, 145 Pac. 506 (1915).

[96] Note 93, *supra*.

[97] 240 U. S. 227, 36 Sup. Ct. Rep. 261 (1916).

[98] Note 43, *supra*.

[99] Note 44, *supra*.

dents in favor of the right of the state to tax domestic corporations as it pleases. The weakness of that distinction was convincingly demonstrated by Mr. Justice Holmes. But at the time it saved Mr. Justice White from direct repudiation of his opinion in *Ashley* v. *Ryan*.[100]

It was not necessary in *Kansas City, F. S. & M. R. Co.* v. *Botkin*[101] either to repudiate or affirm the broad doctrine, formerly prevailing, that the complete power of the state to refuse the privilege of incorporation necessarily sanctions any tax that the state might choose to levy on the enjoyment of the privileges granted, and the opinion of Mr. Justice Hughes is careful to do neither. It says only that a state tax on this privilege "is not necessarily invalid because it is measured by capital stock which in part may represent property not subject to the state's taxing power." [102] The learned justice, however, took pains to show that the reason for the decision was the special circumstances and characteristics of the special case:

"In the present case, the tax is not laid upon transactions in interstate commerce, or upon receipts from interstate commerce either separately or intermingled with other receipts. It does not fluctuate with the volume of interstate business. It is not a tax imposed for the privilege of doing an interstate business. It is a franchise tax — on the privilege granted by the state of being a corporation — and while it is graduated according to the amount of paid-up capital stock the maximum charge is $2,500 in the case of all corporations having a paid-up capital of $5,000,000 or more. This is the amount imposed in the present case where the corporation has a capital of $31,660,000. We find no ground for saying that a tax of this character, thus limited, is in any sense a tax imposed upon interstate commerce." [103]

Clearly, after this opinion, any state court would be in grave doubt as to the proper decision in a case involving a tax on the franchise of a domestic railroad corporation engaged in interstate commerce, if the tax was measured by total capital stock with no maximum limitation. The opinion of Mr. Justice Harlan in the Western Union Case proceeded on a theory which would be equally

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[100] See pages 580–81, 591–92 *supra*.

[101] Note 97, *supra*.

[102] 240 U. S. 227, 232, 30 Sup. Ct. Rep. 261 (1916).

[103] 240 U. S. 227, 235, 30 Sup. Ct. Rep. 261 (1916).

applicable to domestic corporations. A *dictum* declared plainly enough that a domestic corporation engaged in selling merchandise to purchasers in other states could not be subjected to a tax measured by its total receipts as a condition of doing local business.[104] But Mr. Justice White's opinion proceeded on grounds applicable only to foreign corporations, and without his concurrence, the majority would have been a minority. Yet Mr. Justice White also stated that he "did not dissent from the fundamental application which the court made of the commerce clause of the Constitution." [105] His statement of the special grounds on which he concurred might have been regarded as prompted mainly by a desire not to be guilty of inconsistency with his previous position in *Ashley* v. *Ryan*.[106] The difficulty of knowing the precise extent of the new law which the Supreme Court made in the Western Union Case will be apparent when we come to consider the confusion engendered in some of the state courts during the transition period.

So far, however, as the taxation of domestic corporations is concerned, the Supreme Court has largely cleared up the doubts raised by *Kansas City, F. S. & M. R. Co.* v. *Botkin*.[107] For in *Kansas City, M. & B. R. Co.* v. *Stiles*, [108] which is the latest [109] case on the subject, an annual excise measured by total capital stock was exacted from a domestic railroad corporation engaged in transportation between different states. This domestic corporation was created by a consolidation of other corporations under the very statute which imposed the annual excise. As Mr. Justice Day says in the opinion:

"The railroads comprising this consolidation entered upon it with the Alabama statute before them and under its conditions, and, subject to constitutional objections as to its enforcement, they cannot be heard to complain of the terms under which they voluntarily invoked and received the grant of corporate existence from the state of Alabama." [110]

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[104] Note 71, *supra*.

[105] 216 U. S. 56, 64, 30 Sup. Ct. Rep. 232 (1910). See also statement enoted on page 590, *supra*, cited in note 70, *supra*.

[106] Note 33, *supra*. See also page 580–581, *supra*.

[107] Note 97, *supra*.

[108] 242 U. S. 111, 37 Sup. Ct. Rep. 56 (1916).

[109] See note 61, *supra*.

[110] 242 U. S. 111, 117, 37 Sup. Ct. Rep. 56 (1916).

For authority for its position the opinion goes back to *Ashley* v. *Ryan*,[111] thus implying that that case was not shaken by the Western Union Case. It is also said that the objections of the complainant "were so recently discussed, and the previous cases in this court considered in *Kansas City, Ft. S. & M. R. Co.* v. *Botkin*, 240 U. S., 60 Law. Ed. 617, 36 Sup. Ct. Rep. 261, that it would be superfluous to undertake extended discussion of the subject now." [112]

"In that case, after a full review of the previous decisions in this court, it was held that each case must depend upon its own circumstances, and that while the state could not tax property beyond its borders, it might measure a tax within its authority by capital stock which in part represented property without the taxing power of the state. As to the objection based upon the due-process clause of the Constitution, we think that principle controlling here. There is no attempt in this case to levy a property tax; a franchise tax within the authority of the state is in part measured by the capital stock representing property owned in other states." [113]

It is true that the case cited said that each case must depend upon its own circumstances. But one of the circumstances in that case was that the annual imposition was limited to $2,500, however large the capital of the corporation. That circumstance was absent in the Louisville Case. But there was present in the Louisville Case the circumstance that the statute complained of was on the books when incorporation was sought and obtained. So it still remains to be settled by explicit decision that excises on domestic corporations previously chartered may be measured by any method that the state chooses to adopt. The remaining question still left open by the decisions of the Supreme Court is whether taxes on foreign corporations engaged in combined interstate and intra-state commerce, other than some form of transportation using the same facilities for both kinds of commerce, may be measured by total capital stock with no limitation as to the amount to be paid.

Since the foregoing sentence was written and in the hands of the printer, the question thus left open by previous decisions has been answered. On December 10, 1917, the Supreme Court

[111] Note 33, *supra*.

[112] 242 U. S. 111, 118, 37 Sup. Ct. Rep. 56 (1916).

[113] *Ibid.*

decided *Looney* v. *Crane Co.*,[114] and declared invalid a Texas statute, imposing a franchise tax on foreign corporations, which was measured by total capital stock plus surplus and undivided profits. The opinion was by Chief Justice White. It seems to take the position that no foreign corporation engaged in combined domestic and interstate commerce within a state may be subjected to any tax as the price of the privilege of engaging in domestic commerce that would not be proper independently of the enjoyment of such privilege. There is no discussion of the economic effect on interstate business of withdrawal from local business. The opinion relies on "general principles" previously laid down in the Western Union Case [115] and the O'Connor Case.[116] The economic integration of local and interstate transportation which was adverted to and seemingly relied on in those cases is absent in the Looney Case, for the complaining corporation was a foreign manufacturing concern. Its total assets in Texas, consisting of money, merchandise, and two warehouses, were assessed at $301,179. Its total paid-up capital was $17,000,000, and its surplus and undivided profits were $8,129,000. Its gross receipts for the year 1913 were $39,831,000, "of which only $1,019,750 had any relation to the State of Texas and nearly one-half of this amount was the result of transactions purely of an interstate commerce character arising from the sale and shipment of goods from other states to purchasers in Texas who ordered them and from the shipment from Texas to other states for the purpose of filling orders sent from such states." [117]

The facts above given are stated in the opinion of the Chief Justice before the discussion of the constitutional question, but are not again mentioned. All questions of degree are explicitly dismissed from consideration. The Baltic Case [118] and others [119] relied on by the state are said to sustain in no way "the assumption

[114] Number 16, October Term, 1917; 38 Sup. Ct. Rep. 85 (1917). The decision was unanimous, but the fact that it was not reached without some difficulties may perhaps be inferred from the fact that the case was first argued on May 3, 1916, and restored to the docket for reargument May 2, 1917. It was reargued on November 6, 1917, and decided December 10, 1917.

[115] Note 43, *supra*.

[116] Note 83, *supra*.

[117] 245 U. S. —, 38 Sup. Ct. Rep. 85, 86 (1917).

[118] Note 85, *supra*.

[119] Cases cited in notes 94, 97, and 108, *supra*.

that because a violation of the Constitution was not a large one, it would be sanctioned, or that a mere opinion as to the degree of wrong which would arise if the Constitution were violated was treated as affording a measure of the duty of enforcing the Constitution." [120] If the attorneys for the state made and relied on any such assumption, they were unwise. Of course, if a statute violates the Constitution, it violates it. The excuse that the violation is "such a little one" cannot be entertained. But there may well have been more merit in the claim on behalf of the state than the fashion in which it was dismissed would indicate. If the effect on interstate commerce of a state tax on the privilege of doing local business is but slight, this may well warrant a decision that the tax does not "regulate" interstate commerce, but merely "incidentally affects" it. This is a familiar distinction applied in passing judgment upon state exercises of the police power which bear in some measure on interstate commerce. As Mr. Justice Holmes said in dealing with a somewhat analogous problem involving a state tax measured by receipts:

"We are to look for a practical rather than a logical or philosophical distinction. . . . A practical line can be drawn by taking the whole scheme of taxation into account. This must be done by this court as best it may. Neither the state courts nor the legislatures, by giving the tax a particular name or by the use of some form of words, can take away our duty to consider its nature and effect. If it bears upon commerce among the states so directly as to amount to a regulation in a relatively immediate way, it will not be saved by name or form." [121]

The fact that Mr. Justice Holmes himself declined to adopt this kind of reasoning in the Western Union Case is occasion for surprise. The further fact that Chief Justice White, who did follow such lines of thought in the Western Union Case, now abandons them in *Looney* v. *Crane Co.*,[122] is also to be wondered at. The bridge which he built to escape from the force of earlier decisions seems to be wrecked after the crossing is safely made. Possibly this statement needs some qualification, for there is a reference in the opinion to "controlling decisions dealing with cases in substance

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[120] 245 U. S. —, 38 Sup. Ct. Rep. 85, 88 (1917).

[121] Galveston, H. & S. A. R. Co. *v.* Texas, note 41, *supra*, page 227.

[122] Note 114, *supra*.

identical in fact and principle with the case here presented."[123] By this the Chief Justice possibly means to imply that the difference between the business involved in the cases dealing with railroads, parlor-car companies, and telegraph companies, and that of the Crane Company in the principal case, is from a practical and economic standpoint immaterial. But the point is of enough importance to be more explicitly treated. If the Chief Justice intended to make it, he nevertheless used other language which, taken alone, would smother it.

In addition to the franchise tax imposed by Texas, there was involved in the Looney Case a "permit" tax, based on total capital stock exclusive of surplus and undivided profits. The permit tax in force in Texas prior to 1907 was also based on capital stock, but there was a provision that no more than $200 should be charged for a ten-year permit, no matter how large the capital stock of the corporation seeking it. The Act of 1907 removed the limitation, so that the Crane Company would be compelled in 1915 to pay $17,040 for the renewal of the ten-year permit, for which in 1905 it paid only $200. Both the permit tax and the franchise tax were enjoined. They were resisted in reliance on the equal-protection clause, as well as on the due-process and commerce clauses, but the opinion of the court neglects the equal-protection clause, because it holds that both the commerce clause and the due-process clause render the complainant immune from the demands of the state. The central theme of the opinion is as follows:

"It may not be doubted under the case stated that intrinsically and inherently considered both the permit tax and the tax denominated as a franchise tax were direct burdens on interstate commerce and moreover exerted the taxing authority of the State over property and rights which were wholly beyond the confines of the State and not subject to its jurisdiction and therefore constituted a taking without due process. It is also clear, however, that both the permit tax and the franchise tax exerted a power which the State undoubtedly possessed, that is, the authority to control the doing of business within the State by a foreign corporation and the right to tax the intra-state business of such corporation carried on as a result of permission to come in. The sole contention, then, upon which the acts can be sustained is that although they exerted

[123] 245 U. S. —, 38 Sup. Ct. Rep. 85, 87 (1917).

a power which could not be called into play consistently with the Constitution of the United States, they were yet valid because they also exercised an intrinsically local power. But this view can only be sustained upon the assumption that the limitations of the Constitution of the United States are not paramount but are subordinate to and may be set aside by state authority as the result of the exertion of a local power. In substance, therefore, the proposition must rest upon the theory that our dual system of government has no existence because the exertion of the lawful powers of the one involves the negation or destruction of the rightful authority of the other. But original discussion is unnecessary since to state the proposition is to demonstrate its want of foundation and because the fundamental error upon which it rests has been conclusively established." [124]

Needless to say, the proposition would not be so stated except by one who wished to demonstrate its want of foundation. It was not so stated by Mr. Justice Holmes in his dissent in the Western Union and Pullman cases. It was not so stated by Mr. Justice Day in *Kansas City, M. & B. R. Co.* v. *Stiles*,[125] which sustained a tax on a consolidation of domestic corporations engaged in local and interstate transportation, although the tax was measured by the total capital stock, with no provision for a maximum. Every word of Chief Justice White's opinion above quoted might be applied with equal logic to the taxes on domestic corporations, measured by total capital stock. Yet the Chief Justice agrees that such taxation is proper. If a different decision in the Looney Case would deny the existence of the federal system, so does the actual decision of the Stiles Case from which the Chief Justice does not dissent; for the tax in that case was "intrinsically and inherently" beyond the power of the state, if this means that, but for the fact that the subject taxed was a privilege granted by the state, the tax could not be imposed.

The issue in these cases is not to be solved by the logic of the Absolute. Mr. Justice Holmes tried it in his dissent in the Western Union and Pullman cases. Since the state may deny the privilege, he says, it may burden it as it pleases, even though it also burdens interstate commerce. And now the Chief Justice, in similar absolutistic vein, says that, if the tax is intrinsically on interstate commerce, it does not matter that it is also on something else

[124] 245 U. S. —, 38 Sup. Ct. Rep. 85, 87 (1917).

[125] Note 108, *supra*.

which is within the authority of the state. It looks like a dilemma, and it is, so far as any inexorable logic is concerned. The problem of a dilemma cannot be solved by competing asseveration. It is a question of more or less. We can find an illuminating guide to the way out of the difficulty, by appealing from Mr. Justice Holmes in the Western Union Case to Mr. Justice Holmes in *Hudson County Water Co.* v. *McCarter*.[126] In his opinion in that case he tells us:

"All rights tend to declare themselves absolute to their logical extreme. Yet all in fact are limited by the neighborhood of principles of policy which are other than those on which the particular right is founded, and which become strong enough to hold their own when a certain point is reached. . . . The boundary at which the conflicting interests balance cannot be determined by any general formula in advance, but points along the line, or helping to establish it, are fixed by decisions that this or that concrete case falls on the nearer or farther side. . . . It constantly is necessary to reconcile and adjust different constitutional principles, each of which would be entitled to possession of the disputed ground but for the presence of the others." [127]

It is a constitutional principle that a state may not impose taxes on interstate commerce. It is another constitutional principle that a state may impose taxes on the privilege granted to a foreign corporation to carry on local business within the state. The taxes involved in the Western Union Case and in the Looney Case were on such a privilege. They were also on interstate commerce. They come within both constitutional principles. One would declare them valid; the other, invalid. One or the other must yield, for the taxes cannot be both valid and invalid. With respect to such taxes on the privilege of being a domestic corporation, Chief Justice White agrees that the commerce clause must yield. With respect to similar taxes on foreign corporations, he insists that the commerce clause must prevail, or else "the limitations of the Constitution of the United States are not paramount." If either case stood alone, it would be simpler than when the two are found side by side, and both by a unanimous court.

The situation is one that cannot be solved by a formula, as Mr. Justice Holmes has told us. Nevertheless in his dissenting opinion in the Western Union Case he made use of a formula

[126] 209 U. S. 349, 28 Sup. Ct. Rep. 529 (1908).

[127] 209 U. S. 349, 355, 357, 28 Sup. Ct. Rep. 529 (1908).

which he seemed to regard as convincing. "It does not matter," he says, "if the sum [imposed by the State] is extravagant. Even in the law the whole generally includes its parts. If the state may prohibit, it may prohibit with the privilege of avoiding the prohibition in a certain way." [128] Thus he implies that complete prohibition of local business is a whole, of which the imposition of heavy burdens for the privilege of conducting such local business is a part. But the relation of whole and parts exists only where we are dealing with units that are commensurable; and the power of imposing heavy burdens is not a part of the power of absolute exclusion, for the two are not commensurable. It might as well be urged that capital punishment is a whole, of which a day's torture is a part, and that, therefore, the government which might put a man to death for treason may impose torture instead. Less of life is taken by brief torture than by death. But the interests affected by torture are not identical with those affected by death. One conflicts with the constitutional prohibition against cruel and unusual punishments, and the other does not. So the interests affected by heavy burdens on corporations doing a combined local and interstate business are different from those affected by excluding the corporation from local business. A state legislature which forbade all foreign corporations to carry passengers on intra-state journeys within the state would soon learn that it had affected interests which had not been touched by measuring a tax on such corporations by their total capital stock. A state is not exercising its power of exclusion when it imposes an excise tax. If necessary, this can be established by a syllogism. And a syllogism would show that the power to exclude does not necessarily carry with it the power to impose heavy burdens,[129] any more than the power of an owner of property to forbid, or to permit, others to use it, carries with it the power to exact any and all conditions whatever of those admitted to its use.

Of course the policy which permits complete exclusion may well permit the exaction of heavy burdens on those admitted. But this is not necessarily true. The interests to be balanced are not the same in both exertions of state authority. And the decision with respect to each should be based on the pros and contras of

[128] Quoted on page 585, *supra*.

[129] See 16 COL. L. REV. 99, 110–11.

the particular issue in dispute. The problem is a "practical," rather than a "logical or philosophical," one, if logic and philosophy involve the disregard of practical considerations. According to a modern, mundane school of philosophy, however, logic can stoop to the practical, and wade through a world of particulars making differentiations on the basis of results, rather than of superimposed categories. This school would doubtless rephrase the *dictum* of Mr. Justice Holmes and say that the problem is a "logical," rather than a "metaphysical," one.[130] But the difference would be merely one of nomenclature. Both would agree in general that burdens as the price of admission should be treated differently from exclusion, if the two had substantial differences of result. Mr. Justice Holmes, it is to be observed, implied in his dissent in the Western Union Case that the corporation would abandon its local business if such business did not yield the tax assessed thereon. If he was correct in this, the burden would be no greater than that ensuing from exclusion from such business. But the corporation might, on the other hand, continue the local business and recoup itself for the tax thereon by maintaining or increasing interstate rates, if the Interstate Commerce Commission would permit it. This might be more of a burden on interstate commerce than would follow from exclusion from connected intra-state commerce.

It seems likely, however, that heavy taxation on connected intra-state commerce is no more of a burden on interstate commerce than exclusion from the local business would be. Mr. Justice Holmes is probably correct in insisting that the two exercises of state power should be treated alike. The doctrine of the majority in the Western Union Case really shakes the foundation of the previously declared rule that the state has complete power to exclude from local business a foreign corporation seeking to do a combined local and interstate business. Mr. Justice Holmes seems aware of this when he says in his dissent in the Pullman Case, that

[130] Compare Mr. Justice Bradley, in Philadelphia & Southern Mail S. S. Co. *v.* Pennsylvania, 122 U. S. 326, 336–37, 7 Sup. Ct. Rep. 1118 (1887): "If the state cannot tax the transportation, may it, nevertheless, tax the fares and freights received therefor? Where is the difference? Looking at the substance of things, and not a mere form, it is very difficult to see any difference. The one thing seems to be tantamount to the other. It would seem to be rather metaphysics than plain logic for the state officials to say to the company: 'We will not tax you for the transportation you perform, but we will tax you for what you get for performing it.' Such a position can hardly be said to be based on a sound method of reasoning."

exclusion from local business is not a burden on interstate business, but only the denial of a collateral benefit.[131] He, it would seem, regards local and interstate transportation, not as joint products, but each as a by-product of the other. The contrary view seems in better accord with business sense. It is now established that intra-state rates must fit into the system of interstate rates,[132] because interstate commerce is affected by relatively low intra-state rates. And in *West* v. *Kansas Natural Gas Co.*,[133] Mr. Justice McKenna quoted with approval a statement that "no state can by action or inaction prevent, unreasonably burden, discriminate against, or directly regulate interstate commerce or the right to carry it on." [134] From such a statement it would follow that a state could not refuse to let a corporation carry on intra-state commerce in connection with its interstate commerce, if such refusal unreasonably burdened the interstate commerce. It is to be anticipated that a state, if it actually forbade unconditionally any intra-state commerce which was intimately connected with interstate commerce, would find its power circumscribed as is its power over intra-state rates which affect interstate commerce. Exclusion from local business and burdensome taxation on that business are probably so similar in their effect on economically related interstate commerce that they should be treated alike in deciding whether in substance they constitute "regulations" of interstate commerce. Grant Mr. Justice Holmes' hypothesis, and his conclusion is sensible. But his hypothesis is one that the modern development and integration of certain kinds of commerce require us to scrutinize and probably to abandon.

But this scrutiny should keep close to the turf of fact. It should not be as doctrinaire as the assertion that a tax, if levied on local business, cannot be a regulation of interstate commerce, or the contrary assertion that a tax, if measured by elements of interstate commerce, must necessarily be a regulation of that commerce, even though the subject taxed is local commerce. In form all the state taxes which we have been considering are regulations

[131] See passage quoted on page 585, *supra*.

[132] Houston, E. & W. T. R. Co. *v.* United States, 234 U. S. 342, 34 Sup. Ct. Rep. 833 (1914); American Express Co. *v.* South Dakota, 244 U. S. 617, 37 Sup. Ct. Rep. 656 (1917).

[133] 221 U. S. 229, 31 Sup. Ct. Rep. 564 (1911).

[134] 221 U. S. 229, 262, 31 Sup. Ct. Rep. 564 (1911).

of something else than interstate commerce. In substance they have all had some effect on interstate commerce. At the beginning the form was regarded as controlling. The reason given for refusing to consider the substance was that the privilege taxed by the state might be surrendered, and the imposition thereby avoided. Later a majority of the court became convinced that in certain kinds of business the abandonment of local business would itself be so substantial a burden on the interstate business as to amount to a "regulation" thereof. Such an abandonment might in a very real sense be a "regulation" of interstate commerce, even though it were to be regarded as the denial of a collateral benefit rather than the imposition of a burden. For in common sense the effective and economical conduct of interstate transportation requires the collateral benefit of uniting local transportation with that between the states. So also local transportation requires the collateral benefit of interstate transportation. The same roadbed and the same facilities and men are used for both. The physical separation of the two would be an act of folly. To allow a state to require a corporation to choose between such separation and excessive burdens on the local business is to allow it to interfere seriously with the only reasonable method of conducting the interstate business.

It by no means follows, however, that what is true of the transportation business is true of all other businesses. And if the transition which the court made in the Western Union Case was one from form to substance, substance rather than form should be regarded in applying the new doctrine to other businesses than those which inevitably use the same facilities in both local and interstate commerce. But the reasoning of Chief Justice White in the Looney Case is formal rather than substantial. On the one hand, it is conceded that the state is exercising "an intrinsically local power." This is because the subject on which the tax is levied is within the taxing jurisdiction of the state. On the other hand, the tax so levied, "intrinsically and inherently considered," is a direct burden on interstate commerce. This is because it is measured by total capital stock, and therefore depends for its amount on the entire assets and business of the corporation, and not merely on those local to the state. The Chief Justice concludes that it inexorably follows that a tax so measured is an invalid regulation of interstate commerce. All his colleagues concur in

the result and none expresses dissent from the reasoning. Yet the Chief Justice and the same colleagues all agree that a tax on a domestic corporation similarly measured is not a regulation of interstate commerce.[135] On any basis of purely formal reasoning, the two decisions are irreconcilably opposed.[136]

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[135] Kansas City, M. & B. R. Co. *v.* Stiles, note 108, *supra.*

[136] There may be a practical reason why it is not necessary to circumscribe the power of a state in its taxation of the franchises of domestic corporations engaged in interstate commerce. If the tax becomes unduly burdensome, the corporation may surrender its state charter and obtain a federal charter. Congress, under the power to establish post offices and post roads, and the further power to make all necessary and proper laws for carrying into effect the postal power, may charter a corporation to engage in intra-state, as well as in interstate, transportation. Such a franchise would be immune from state taxation. California *v.* Central Pacific Railroad Co., 127 U. S. 1, 8 Sup. Ct. Rep. 1073 (1888). See note 171, page 371, *supra.* See also LINDSAY ROGERS, THE POSTAL POWER OF CONGRESS (Baltimore, 10, 91–96, 150–57.

Now that the federal government has taken over the control and management of the railroads under the war power, and under the terms proposed at this writing (January 7, 1918), will pay to the roads guaranteed dividends on the stock, and will therefore be affected financially by all state taxes on the property and franchises and intra-state business of the roads, interesting and important questions are raised with respect to the power of the states to impose without the consent of Congress any taxes which affect the net income from operation and management. From an economic standpoint the fact that the roads are still privately owned is unimportant, if the government is to pay what amounts to a rental determined by dividends in past years. A state tax on intra-state receipts will come out of the United States government. Could such a tax be imposed without the consent of Congress? It is clear that no state could tax receipts derived from business for the government. Western Union Telegraph Co. *v.* Texas, 105 U. S. 460 (1881). But does this rule now apply to all the business done? South Carolina *v.* United States, 199 U. S. 437, 26 Sup. Ct. Rep. 110 (1905), establishes that the federal government may tax business of a private nature conducted by a state. It does not follow, however, that a similar doctrine will be applied to state taxation of private business conducted by the United States government; for, though the state cannot tax franchises granted by the United States, California *v.* Central Pacific Railroad Co., *supra*, the United States can tax franchises granted by the state, or, what is the same in effect, the doing of business by virtue of such franchises. Flint *v.* Stone Tracy Co., 220 U. S. 107, 31 Sup. Ct. Rep. 342 (1911). Furthermore, in Van Brocklin *v.* Tennessee, 117 U. S. 151, 6 Sup. Ct. Rep. 670 (1886), it was declared by Mr. Justice Gray that "The United States does not and cannot hold property, as a monarch may, for private or personal purposes." But this was nearly twenty years before the South Carolina Case, and things have moved since then. One who was not timid about making prophecies might feel fairly safe in venturing to predict that the Supreme Court would not withdraw from the taxing powers of the states, the local and private business done by the railroads under government operation, unless Congress should expressly prescribe otherwise.

Since it is held that a state tax on property may be measured by receipts from interstate commerce, United States Express Co. *v.* Minnesota, 223 U. S. 335, 32 Sup.

This return to scholasticism after the realistic attitude adopted in the Western Union Case is disappointing, especially to one who had previously completed for incorporation in this article a discussion of state decisions subsequent to the Western Union Case, which discussion had as its keynote the statement that "the Supreme Court has abandoned the test of artificial legal distinctions for the test of practical results," and the further statement that "whether any tax on domestic business burdens interstate commerce depends of course on the effect on interstate commerce of abandoning the local business." In this unpublished discussion the opinion was ventured that the Supreme Court might, in dealing with taxes on corporations not engaged in transportation, "regard the actual burden imposed by any tax on interstate commerce," and therefore "take account of the rate of levy as well

Ct. Rep. 211 (1912), and that property privately owned, but employed in work for the federal government, is not exempt from state taxation, Baltimore Shipbuilding Co. *v.* Baltimore, 195 U. S. 375, 25 Sup. Ct. Rep. 50 (1904), and Gromer *v.* Standard Dredging Co., 224 U. S. 362, 32 Sup. Ct. Rep. 499 (1912), it seems likely that the existing state taxes on the property of the railroads would not be affected by their transition to governmental control. If a state tax on property may be measured by receipts from interstate commerce, it would seem that it might also be measured by receipts from the federal government, under the doctrine of Home Insurance Co. *v.* New York, note 31, *supra*. See 31 HARV. L. REV. 321, 334–35. Of course the theory of the opinion in Looney *v.* Crane Co., note 114, *supra*, would require the overruling of the Home Insurance Case, since the most recent pronouncement of the Supreme Court takes the position that the states cannot use their lawful powers in ways that resemble too closely the use of unlawful powers, and that, therefore, they cannot measure taxes on proper subjects by elements that cannot be taxed directly. But no case has as yet applied this doctrine to state taxes which are indirect encroachments on federal instrumentalities.

The Home Insurance Case would by inference authorize the states to measure taxes on corporate franchises by receipts from the United States government. But later cases under the commerce clause forbid measuring state taxes on privileges of foreign corporations by total capital stock, though taxes on domestic franchises may be so measured. From these decisions, except for the doubts engendered by the opinion in the Looney Case, we might assume that state taxes on the franchises of domestic corporations operating railroads will not be affected by the federal control of the roads. As to state taxes on privileges of foreign corporations engaged in transportation, and now managed by the federal government, the answer to the question, whether they can be measured by receipts from the United States, would depend upon whether the court will regard the measure of receipts as vicious as the measure of total capital stock, and of course upon the general question whether, since the new enterprise of the national government is essentially private and pecuniary as distinguished from governmental, the doctrine of the South Carolina Case will apply. At any rate, Congress should by specific legislation prevent all these troublesome questions from arising.

as the measure to which that rate is applied." But the opinion of the Chief Justice in *Looney* v. *Crane Co.*[137] seems to give a death blow to those prophecies. It indicates that no longer does each case depend upon its own circumstances, as previous decisions of the court had declared.[138]

There is of course a distinct advantage in declaring that the measure of total capital stock, with no provision for a maximum, cannot be applied to an excise on a foreign corporation engaged in any kind of interstate commerce in connection with its local business. Such a measure has vicious potentialities, and it may be well to outlaw it, even when it is kept in leash by an infinitesimal rate of levy. Such outlawry will relieve the court from considering in each case the ratio between the local business and the total business of the corporation, and from determining whether the sum exacted by the application of the measure is out of proportion to the value of the privilege of conducting local business. The court will still have to consider such questions in determining whether the maximum provision in such statutes as that applied in the Baltic Case is sufficiently low. Corporations with little capital might prefer a low rate applied to total capital, with no maximum, to a higher rate applied to total capital, with a maximum which would not affect the amount exacted of them. The Supreme Court may be pardoned for a desire to get back to some broad general rules, after the confusion engendered by its distinction between the Western Union Case and the Baltic Case. Yet the references to the business of the complainants in the Baltic Case, and to the excess of their actual assets over their authorized capital, warrant the belief that the court in that case did not mean to declare that a $2,000 maximum rendered completely innocuous the measure of total capital stock, so that the Massachusetts statute was necessarily applicable to every foreign corporation. If Massachusetts should increase its rate of levy, the provision that the tax should not exceed $2,000 might not be sufficient to save it from burdening the interstate commerce carried on by corporations with a small capital stock. So that even after the Looney Case, it may be impossible for the court to avoid the consideration of the details and size of the business of a foreign cor-

[137] Note 114, *supra*.

[138] See quotations to this effect, on pages 595, 598, 600, *supra*.

poration subjected to an excise tax, measured by total capital stock, but limited in amount. So long as the court gives weight to such considerations, it may apply the statute to some corporations and decline to apply it to others. It is by no means certain that such formal reasoning as was applied in the Looney Case will be applied to future cases on the subject under consideration. The reasoning in a judicial opinion reflects primarily the attitude of the particular judge who writes it. So long as his colleagues are satisfied with the disposition of the case, they may be disinclined to express disagreement with the opinion, merely because it may strike some contributor to a legal periodical as tending to formalism, where formalism is thought undesirable.

It cannot be gainsaid that there is wholesome sense in forbidding a state to measure any excise tax by property or business without the state. The opinion in the Looney Case, by invoking the due-process clause as well as the commerce clause, indicates that a tax on foreign corporations engaged solely in domestic business cannot be measured by total capital stock. This doctrine would overrule *Horn Silver Mining Co.* v. *New York*.[139] Such an intention on the part of the Supreme Court is, however, not to be safely inferred, since the due-process clause may be used in the Looney Case merely as a flying buttress to support the wall erected on the foundations of the commerce clause. But the law on the taxation of foreign corporations has shown itself to be far from rigid since 1910, and prophecies are dangerous, as the plight of one who wrote before the Looney Case demonstrates.

A consideration of Chief Justice White's discussion of earlier cases may lead to the conclusion that he does not abandon practical considerations so completely as some of his language in the Looney Case suggests. But his use of the practical is for the purpose of differentiating the cases adduced on behalf of the state. Of the Western Union Case and those following it which sustained objections of the taxpayers,[140] he says that they

[139] 143 U. S. 305, 12 Sup. Ct. Rep. 403 (1892). See also Philadelphia Fire Ass'n *v.* New York, 119 U. S. 110, 7 Sup. Ct. Rep. 108 (1886).

[140] These are the cases cited in notes 43, 44, 81, and 83, *supra*, and International Textbook Co. *v.* Pigg, 217 U. S. 91, 30 Sup. Ct. Rep. 481 (1910). The Pigg Case involved a statute requiring all foreign corporations, as a prerequisite to bringing suit in the courts of the state, to file with the secretary of state a statement of their financial condition, etc. The case held that the statute could not be applied to

"were concerned in various forms with the identical questions here involved and authoritatively settled that the states are without power to use their lawful authority to exclude foreign corporations by directly burdening interstate commerce as a condition of permitting them to do business in the state in violation of the Constitution, or because of the right to exclude, to exert the power to tax the property of the corporation and its activities outside of and beyond the jurisdiction of the state in disregard, not only of the commerce clause, but of the due process clause of the Fourteenth Amendment." [141]

This is true, in so far as the general principle is concerned. But the cases involved, not only the general principle, but the application of it to the facts of each case. Those facts included the character of the complainant's business [142] as well as the measure of the tax. The questions involved in the earlier cases are not identical with those involved in the Looney Case, unless the businesses in all the cases are identical. This point the Chief Justice overlooks. This is apparent from the following quotation from his opinion:

"The dominancy of these adjudications is plainly shown by the fact that as a result of the decision in the leading case (*Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1, 30 Sup. Ct. 190, 54 L. Ed. 355) the Supreme Court of the state of Texas, recognizing the repugnancy of the permit tax law here in question to the Constitution of the United States, enjoined its enforcement (*Western Union Telegraph Co.* v. *State*, 103 Tex. 306, 126 S. W. 1197), . . ." [143]

But that Texas decision involved the same corporation which succeeded in escaping from the Kansas statute in the Western Union Case. The Texas decision was rendered less than three months after that of the Supreme Court,[144] and three years before the

foreign corporations engaged in interstate commerce, and that the correspondence school whose rights were in issue was engaged in such commerce.

[141] 245 U. S. —, 38 Sup. Ct. Rep. 85, 87 (1917).

[142] Note the emphasis on this point by Mr. Justice White in the passage quoted on page 587, *supra*, and by Mr. Justice Harlan in the passage quoted on pages 590-91, *supra*.

[143] 245 U. S. —, 38 Sup. Ct. Rep. 85, 87 (1917).

[144] The full opinion of the Texas supreme court, by Mr. Chief Justice Gaines, was as follows:

"Since this suit was brought to this court, the Supreme Court of the United States in the case of Western Union Telegraph Co. *v.* The State of Kansas, has ruled that a similar law of Kansas was unconstitutional. This renders unnecessary any dis-

decision in the Baltic Case,[145] which involved a business like that of the complainant in the Looney Case, and not like that of the Western Union Telegraph Company.

In the Looney Case, the state naturally sought to sustain the tax on the authority of the Baltic Case and those following it, in which the complaining taxpayer was denied relief.[146] But the Chief Justice answers:

"The incongruity of the contention will be manifest when it is observed that not only did the cases relied upon contain nothing expressly purporting to overrule the previous cases, but on the contrary in explicit terms declared that they did not conflict with them and that they proceeded upon conditions peculiar to the particular cases. . . .[147] These conditions related to the subject-matter upon which the tax was levied, or to the amount of taxes in other respects paid by the corporation, or limitations on the amount of the tax authorized when a much larger amount would have been due upon the basis upon which the tax was apparently levied. . . .[148]

"It follows, therefore, that the cases which the argument relies upon do not in any manner qualify the general principles propounded in the previous cases upon which we have rested our conclusion since the later cases rested upon particular provisions in each particular case which it was held caused the general and recognized rule not to be applicable." [149]

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cussion of the question involved in this suit. Upon the authority of the case cited, the judgments of the District Court and of the Court of Civil Appeals are reversed and judgment here rendered for the Western Union Telegraph Company."

[145] Note 85, *supra*.

[146] These are the cases cited in notes 85, 94, 97, and 108, *supra*.

[147] 245 U. S. —, 38 Sup. Ct. Rep. 85, 87 (1917).

[148] 245 U. S. —, 38 Sup. Ct. Rep. 85, 88 (1917).

[149] 245 U. S. —, 38 Sup. Ct. Rep. 85, 88 (1917). In the same paragraph, the Chief Justice also says of the Baltic Case and those following it in which taxes were sustained:

"In the first place it is apparent in each of the cases that as the statutes under consideration were found not to be on their face inherently repugnant either to the commerce or due process clauses of the Constitution, it came to be considered whether by their necessary operation and effect they were repugnant to the Constitution in the particulars stated, and this inquiry it was expressly pointed out was to be governed by the rule long ago announced in Postal Telegraph Cable Co. *v.* Adams, 155 U. S. 688, 698, 15 Sup. Ct. Rep. 268, 270 that 'the substance, and not the shadow determines the validity of the exercise of the power.' In the second place, in making the inquiry stated in all of the cases, the compatibility of the statutes with the Constitution which was found to exist resulted from particular provisions contained in each of them which so qualified and restricted their operation and necessarily so limited their effect as to lead to such results."

From the application of the foregoing language to the Stiles Case, note 108, *supra*,

The general and recognized rule adverted to may be phrased as the rule that the power of the state to tax intra-state commerce, or some privilege granted by the state, does not involve the power to destroy intra-state commerce, if such destruction would substantially burden interstate commerce. But the application of this general rule to any particular case necessitates the inquiry whether the abandonment of intra-state commerce in order to escape the tax, would in fact substantially burden interstate commerce. Previous to the Looney Case, at any rate, there was no *general* rule that a state tax on a proper subject could not be measured by elements which could not be subjected to direct taxation. If there was any *general* rule, it was to the contrary effect.[150] The only recognized exception to this previous general rule was, that a tax on the privilege of a foreign transportation corporation to carry on domestic commerce could not be measured by total capital stock with no maximum limitation. In the Looney Case, a similar exception is established in favor of foreign corporations making both local sales within the state, and also interstate sales within and without the state. But the exceptions now seem to constitute a new "general and recognized rule." Yet to this new rule there are exceptions in favor of excises on domestic corporations, even if engaged in interstate transportation, and in favor of foreign corporations engaged in local sales, if a reasonable limit is set to the annual imposition.

The opinion in the Looney Case is to be criticized for its failure

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a tax on a domestic corporation engaged in interstate as well as intra-state transportation, measured by total capital stock with no maximum limitation, is not on its face inherently repugnant to the Constitution. From its application to the Baltic Case, note 85, *supra*, a tax on a foreign corporation, measured by total capital stock with a maximum limitation of $2,000, is not inherently repugnant to the Constitution, even as applied to corporations engaged in interstate as well as intra-state sales. But the Texas statute under review, by selecting the total capital stock as a measure of a tax on the franchise of a foreign corporation whose business is substantially like that of the S. S. White Dental Company involved in the Baltic Case, makes the tax one which "intrinsically and inherently considered" is a direct burden on interstate commerce, and the exercise of "a power which could not be called into play consistently with the Constitution. . . ."

[150] For recognitions of this rule in opinions of the Supreme Court subsequent to the Western Union Case, see the quotations from the opinion in the Baltic Case on page 596, *supra*, from the opinion in the Stiles Case on page 599, *supra*, and from the opinion in Flint *v.* Stone Tracy Co., 220 U. S. 107, 165, 166, 31 Sup. Ct. Rep. 342 (1911), in note 42 on pages 333–34, *supra*.

to tell us why foreign corporations engaged in the business of making local and interstate sales within the state are excepted from the former general rule, and included in the new general rule, when domestic corporations conducting a combined local and interstate transportation business are not. None of the reasoning in the opinion accounts for this difference of treatment. It would have been well, too, to have pointed out explicitly that the provision for a maximum in the Massachusetts statute applied in the Baltic Case was essential to the decision of that case, and that the fact that the corporations there involved were not engaged in transportation was not alone sufficient to justify measuring an excise on their local business by their total capital stock. For the Massachusetts supreme court assumed the contrary [151] three months before the United States Supreme Court decided the Looney Case. By reverting to "general and recognized rules" the Supreme Court is unnecessarily confusing the state courts, particularly when the Supreme Court recognizes that there are exceptions to these "general" rules, and fails to state specifically why the case at bar does not come within such exceptions.

Though the opinion in the Looney Case is less illuminating than might be desired, the decision establishes that the measure of total capital stock, with no provision for a maximum, is inherently and incurably vicious, when applied to an excise on a foreign corporation manufacturing goods in other states, and making domestic and interstate sales within the state. The reasoning of the opinion would, taken by itself, lead one to infer that the doctrine of the case would apply also to a foreign corporation engaged in local manufacturing and making local and interstate sales within the state.[152] It would lead one to infer that the doctrine would apply to an excise on foreign corporations, measured by any receipts which included receipts from interstate commerce.[153] But the reasoning would lead also to the inference that the doctrine would apply to a domestic corporation and to a tax on the property of a foreign corporation, measured by receipts which include receipts from interstate commerce. We know, however, that the doctrine

[151] International Paper Co. *v.* Commonwealth (Mass.), 117 N. E. 246 (September 13, 1917).

[152] The contrary was held in International Paper Co. *v.* Commonwealth, note 151, *supra*, and Atlas Powder Co. *v.* Goodloe, 131 Tenn. 490, 175 S. W. 547 (1915).

[153] The contrary was held in Baldwin Tool Works *v.* Blue, 240 Fed. 202 (1916).

does not apply to such cases.[154] Therefore we cannot rely for our exposition of the law on the general statements made in the Looney opinion. We must still seek the law in the concrete decisions, and not in the general statements. Of course in this respect the decisions and opinions under review are not peculiar. The vital principle of the law is to be found not in abstract doctrine, but in specific and detailed adjustments of concrete situations.

(To be continued.)

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[154] Kansas City, F. S. & B. R. Co. *v.* Stiles, note 108, *supra;* United States Express Co. *v.* Minnesota, 223 U. S. 335, 32 Sup. Ct. Rep. 211 (1912).